

TOPICAL INDEX

	PAGE
Preliminary statement	1
Statement as to jurisdiction.....	1
Facts	2
Appellant's argument	7
Point I. Laurence Massa is not a proper cross-defendant.....	8
Point II. The first cause of action in the cross-complaint relating to an alleged patent infringement does not contain facts sufficient to constitute a cause of action.....	10
Point III. The judgment entered in favor of cross-complainant is void.....	14
Point IV. The judgment rendered in favor of the cross-complainant should be reversed.....	16

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arlac v. Hat Corporation of America, 166 F. 2d 286.....	13
Associated Plastics v. Gits Molding, 182 F. 2d 1000.....	15
Baltimore & Ohio v. Chicago River, 170 F. 2d 654.....	8
Barbasol Co. v. Jacobs, 160 F. 2d 336.....	16
Bettis v. Patterson-Ballagh Corp., 16 Fed. Supp. 455.....	13
Brody v. Charles I. Hubbs & Co., 11 F. R. D. 337.....	9
Cummings v. Moore, 202 F. 2d 145.....	15
Girdlar v. E. I. Du Pont, 56 Fed. Supp. 871.....	13
Hook v. Hook & Ackerman, 187 F. 2d 52.....	8
Hopkins v. McClure, 148 F. 2d 67.....	2
Maurer, F. W., v. Andrews, 30 Fed. Supp. 637.....	12
McRanie v. Palmer, 2 F. R. D. 479.....	8
Miller v. Camerco, 11 F. R. D. 560.....	8
New Discoveries v. Wisconsin Alumni, 13 Fed. Supp. 596.....	12
Oliver United Filters v. Silver, 206 F. 2d 658.....	15
Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403.....	15
Payne Furnace v. Williams Wallace, 117 F. 2d 823.....	15
Pomerontz v. Jean Vivedou, 65 Fed. Supp. 948.....	12
Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co., 151 F. 2d 91	15
Rolley Inc. v. Younghusband, 204 F. 2d 209.....	16
San Francisco Lodge v. Forestal, 58 Fed. Supp. 466.....	12
Savoia Film v. Van Guard Film, 10 F. R. D. 64.....	8
Taylor v. Brotherhood of Ry. etc., 106 Fed. Supp. 438.....	13
Thermo-Plastics v. International Corporation, 42 Fed. Supp. 408	10
Tremond v. Schering, 122 F. 2d 702.....	10, 12, 14
Tuthill v. Wilsey, 85 Fed. Supp. 586.....	12, 14
Zenith v. R. C. A., 78 Fed. Supp. 591.....	13

RULES	PAGE
Federal Rules of Civil Procedure, Rule 13	3, 6
Federal Rules of Civil Procedure, Rule 14.....	3, 4, 5
Federal Rules of Civil Procedure, Rule 14a.....	4
Federal Rules of Civil Procedure, Rule 19	3, 5, 6, 7
Federal Rules of Civil Procedure, Rule 19a.....	8, 9
Federal Rules of Civil Procedure, Rule 19b	8, 9
Federal Rules of Civil Procedure, Rule 33.....	14
Federal Rules of Civil Procedure, Rule 37d.....	14
Federal Rules of Civil Procedure, Rule 55.....	6
Federal Rules of Civil Procedure, Rule 55b(1).....	14
Federal Rules of Civil Procedure, Rule 55b(2).....	14, 16

STATUTE

United States Code, Title 28, Sec. 2201	2, 14
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No. 14935.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAURENCE MASSA,

Appellant,

vs.

JIFFY PRODUCTS Co., Inc.,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

This is an appeal by the cross-defendant, Laurence Massa, from a judgment entered in favor of the cross-complainant, Jiffy Products Co., Inc. [Tr. of Rec. pp. 100-101].

Statement as to Jurisdiction.

This action was commenced by Jetco, Inc., a California corporation [Tr. of Rec. p. 3, Par. I] in the Superior Court of the State of California, in and for the County of Los Angeles [Tr. of Rec. p. 3]. The defendant and cross-complainant Jiffy Products Co., Inc., a Texas corporation [Compl. Par. II, Tr. of Rec. pp. 3-4], on the

basis of diversity of citizenship, transferred this matter to the Federal Court. On the 6th day of September, 1955, a default judgment was entered in favor of the cross-complainant, Jiffy Products Co., Inc., against Laurence Massa, the cross-defendant [Tr. of Rec. pp. 99-100]. Jurisdiction is claimed by the appellee under 28 U. S. C., Sec. 2201 [Tr. of Rec. p. 45].

An aggrieved party may prosecute a timely appeal from a default judgment. (*Hopkins v. McClure*, 148 F. 2d 67, 69.)

Facts.

In November of 1950, Jetco, Inc., a California corporation [Tr. of Rec. p. 3] commenced an action against Jiffy Products Co., Inc., and others for unfair competition, property damage and for an accounting [Tr. of Rec. pp. 3-10]. The complaint, simple in form, contained two causes of action. The first was for unfair competition [Tr. of Rec. pp. 3-7] and the second for violation of a trade mark allegedly owned by the plaintiff [Tr. of Rec. pp. 7-9]. The gravamen of both causes of action is that the plaintiff, a manufacturer of bucket teeth, used the name "Jiffy" on its products [Pars. VII and VIII of the Compl.; Tr. of Rec. pp. 5-6] and that the defendant, Jiffy Products Co., Inc., made the same type of teeth and also used the name "Jiffy" on its product [Par. VII of the Comp.; Tr. of Rec. p. 6]; that the defendant sold this product in the State of California and elsewhere, thereby competing unfairly with the plaintiff [Par. VIII of Compl.; Tr. of Rec. pp. 6-7].

Subsequently this cause was removed to the Federal Court, where the defendant made answer [Tr. of Rec. pp. 11-23] including a counterclaim [Tr. of Rec. pp. 23-36].

At a later time it developed that the plaintiff was neither the owner nor the assignee of the registered trade mark "Jiffy" and plaintiff thereupon withdrew its second cause of action based on trade mark infringement [Tr. of Rec. p. 93], so that all that now remains is a simple cause of action for unfair competition between Jetco, Inc., a California corporation, and Jiffy Products Co., Inc., a Texas corporation. An injunction *pendente lite* was granted by the Court, and the matter is now set for trial for October 2, 1956.

Laurence Massa, an individual, is ostensibly the owner of patent No. 2,319,464 [Tr. of Rec. pp. 45-46] and registered trade mark "Jiffy" bearing registration No. 528,058 [Tr. of Rec. p. 5].

In April of 1953, the defendant, Jiffy Products Co., Inc., moved the Court under Rules 13, 14 and 19 of the Federal Rules of Civil Procedure for the addition of Laurence Massa to the cause of action as a third party defendant [Tr. of Rec. p. 39]. The motion alleged that "Laurence Massa is a necessary party" [Tr. of Rec. p. 41, item 4], and on May 13, 1953, the Court entered an order "That Laurence Massa be made a third party defendant to this action" [Tr. of Rec. p. 44, item 1] (Rule 14, F. R. C. P.). A third party summons under Rule 14 of the F. R. C. P. was thereupon issued against Laurence Massa, third party defendant [Tr. of Rec. p. 66] and a

third party complaint filed [Tr. of Rec. pp. 44-65]. It should be particularly noted that the third party complaint was directed *only against Laurence Massa* [Tr. of Rec. p. 44; Par. II, Tr. of Rec. p. 45; Par. I, Tr. of Rec. p. 58]. No cause of action on the third party complaint was directed against the plaintiff, Jetco, Inc., and no relief was sought against the plaintiff, Jetco, Inc. [Tr. of Rec. pp. 64-65]. The third party complaint was thereupon served upon Laurence Massa thereby giving the court jurisdiction over his person as a third party defendant under Rule 14, F. R. C. P.

Upon being served with the summons and complaint, Laurence Massa as a third party defendant immediately moved to dismiss and strike the pleadings and the Order [Tr. of Rec. pp. 79-80]. The gravamen of the motion was in effect that the issuance of a third party summons and complaint under Rule 14, F. R. C. P. was void insofar as Laurence Massa was concerned; that Rule 14 is applicable only where the third party defendant would become liable to the defendant if in the event a judgment was rendered in favor of the plaintiff as against the defendant (28 U. S. C. A. Rule 14a); that the third party complaint showed no privity of liability from the third party defendant to the defendant; that even if the defendant obtained complete relief as against the third party defendant on the third party complaint as pleaded, it could in no way lessen, diminish or alter the defendant's liability to the plaintiff.

The force of Laurence Massa's motion, and the error of making him a third party defendant under Rule 14, was immediately discernible to the defendant [Tr. of Rec. p. 83, item 5] for it promptly moved the court for an order under Rule 19, F. R. C. P. to "reidentify" third party defendant Laurence Massa as a defendant [Tr. of Rec. pp. 81-84]. On the 30th day of September, 1953 the court entered an "Order Supplementing and Modifying Order of May 12th, 1953, filed May 13th, 1953" and altered the status of Laurence Massa from a third party defendant to a cross-defendant on the ground that Laurence Massa was an *indispensible* party to plaintiff's cause of action for trade mark infringement, patent infringement and trade mark cancellation [Tr. of Rec. pp. 94-95]. The court, therefore, although it obtained jurisdiction over Laurence Massa under Rule 14, F. R. C. P. [Tr. of Rec. p. 66] impropriated it under Rule 19, F. R. C. P., and the third party complaint metamorphosed into a cross-complaint.

Again it should be specifically noted that although Jurisdiction over Laurence Massa was desired on the grounds that he was a necessary and indispensable party to the plaintiff's cause of action against the defendant [Tr. of Rec. p. 83, item 4; p. 94, items 1 and 2] the cross-complaint is directed only against Laurence Massa, and the cross-complaint desired no relief whatsoever against plaintiff.

In April of 1954, the cross-defendant Massa moved to dismiss the cross-complaint on jurisdictional grounds and

on the further grounds that the cross-complaint was not within the meaning of either Rules 13 or 19 of F. R. C. P. [Tr. of Rec. pp. 96-97]. The motion was denied on the ground,

“ . . . that the presence of Laurence Massa in this case will eliminate piecemeal litigation in agreement with the purposes of the Federal Rules of Civil Procedure. . . .” (Italics added.) [Tr. of Rec. p. 98, item 1.]

On September 6, 1955, the cross-complainant obtained a default judgment against the cross-defendant Laurence Massa (without the plaintiff participating therein) granting it all the relief prayed for in its cross-complaint [Tr. of Rec. pp. 99-100]. The judgment as a matter of law (F. R. C. P., Rule 55) could not and did not settle any issues as between the plaintiff and the defendant, and the basis of making Laurence Massa a cross-defendant under Rule 19, F. R. C. P. on the grounds that he was a necessary and indispensable party to an adjudication of the rights between the plaintiff and the defendant is now established to be entirely fictitious. In any event piecemeal litigation is being furthered in contravention to the order of April 29, 1954 [Tr. of Rec. p. 98] for the issue between plaintiff and defendant still must be tried. Moreover, since plaintiff did not participate in the default judgment and was not a party thereto, the judgment of cross-complainant against Laurence Massa is not binding on the plaintiff.

APPELLANT'S ARGUMENT.

The argument of the cross-defendant, Laurence Massa, is simply this:

If John sues me in negligence, can I, in the same cause of action bring a cross-complaint against John's brother-in-law on a promissory note?

Rule 19 of the Federal Rules of Civil Procedure makes provisions that where issues are to be determined between litigants, the court may bring in as cross-defendants, all parties who are interested in the determination of these issues, so that piecemeal litigation may not be had if the court can make one brief determination. The guiding light is that all parties must have an interest in the determination of the same issue.

It must be emphasized that in this particular situation, although the defendant constantly iterated that Laurence Massa was a *necessary* and *indispensable* party to the issues between the plaintiff and the defendant, both its third party complaint and its cross-complaint were directed *only against Laurence Massa*. Nowhere, and never at any time, did the defendant seek any relief or adjudication against the plaintiff of those issues in which it sought judgment against Laurence Massa. The defendant desired relief against Laurence Massa, on issues which were entirely independent and alien to plaintiff's cause of action against defendant. Further evidence of this is that the cross-complainant was able to obtain his complete relief against the cross-defendant, without in any way disturbing plaintiff's cause against defendant and without plaintiff in any way participating therein [Tr. of Rec. pp. 99-100].

POINT I.

Laurence Massa Is Not a Proper Cross-Defendant.

Rule 19a, F. R. C. P. provides that:

“Persons having a *joint interest* shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant. . . .” (*Italics added.*)

This is the provision of the F. R. C. P. which provides for making party litigants indispensable parties.

An indispensable party, as set forth in Rule 19a is one whose interest in the subject matter of the suit and in the relief sought are so bound up that his legal presence as a party to the proceedings is absolutely necessary.

Hook v. Hook & Ackerman, 187 F. 2d 52;

Baltimore & Ohio v. Chicago River, 170 F. 2d 654, 658.

As the rule states, there must be a *joint interest* between the persons, and if the Court can proceed and do justice *without affecting such persons, they are not indispensable parties.*

McRanie v. Palmer, 2 F. R. D. 479.

Nor is Laurence Massa a necessary party to the proceedings as defined by Section 19b, F. R. C. P., for necessary parties are those whose presence are required to adjudicate the controversy.

Savoia Film v. Van Guard Film, 10 F. R. D. 64.

But in either event, whether indispensable party or necessary party, the test is whether the controversy arises out of the same transaction.

Miller v. Camerco, 11 F. R. D. 560.

Analyzing the pleadings in the case at bar, it is readily established that plaintiff's iniquities against the defendant are in no wise related to defendant's grievances against Laurence Massa. The cross-complaint contains three causes of action and *all of them are directed against Laurence Massa only*. Nowhere in the cross-complaint is any mention made, nor is any relief sought, against the plaintiff. The most favorable interpretation that can be given to the cross-complainant on its cross-complaint, is that it has a law suit against Laurence Massa, which is utterly foreign and alien to the law suit between the plaintiff and the defendant. The plaintiff's claim against the defendant is one for unfair competition; namely, that the defendant did compete unfairly with the plaintiff. The defendant's complaint against Laurence Massa as set forth in his cross-complaint deals with the adjudication of a patent which has nothing whatever to do with the plaintiff; and the question of ownership of a trade mark which again has nothing to do with the plaintiff. It is obvious, therefore, that Laurence Massa is neither an indispensable nor a necessary party to adjudicate the rights between the plaintiff and the defendant for unfair competition under Rule 19a which permits joinder of parties who have a *joint interest* or under 19b which permits a joinder of parties required to a complete determination of the issues involved.

The case of *Brody v. Charles I. Hubbs & Co.*, 11 F. R. D. 337, is precisely in point. In that case the plaintiff commenced a proceeding for unfair competition and trade mark infringement. In that case the plaintiff was a licensee under a patent and trade mark from Cellojac. Judge Kaufman (p. 338) held that since the complaint was a simple and singular cause of action for unfair com-

petition based on a simulation of plaintiff's product and misrepresentation by the defendants, and there was no claim made by the plaintiff for patent infringement, the patent owner Cellojac was neither an indispensable nor even a necessary party to the action.

Undoubtedly the entire controversy between plaintiff, Jetco, Inc., and defendant, Jiffy Products Co., Inc., could be determined without the presence of Laurence Massa.

POINT II.

The First Cause of Action in the Cross-Complaint Relating to an Alleged Patent Infringement Does Not Contain Facts Sufficient to Constitute a Cause of Action.

The first cause of action of the cross-complaint [Tr. of Rec. pp. 45-51] does not state a claim. An action for declaratory relief to have a patent declared invalid must allege that the pleader is an infringer of the patent and that the patentee is threatening the pleader with an infringement of the patent. (*Tremond v. Schering*, 122 F. 2d 702.) Such allegations to create a justiciable controversy are necessary to state a cause of action in declaratory relief. The first cause of action of the cross-complaint [Tr. of Rec. pp. 45-51] contains neither.

This rule of law is fully set forth in the case of *Thermo-Plastics v. International Corporation*, 42 Fed. Supp. 408, 410, where the court granted summary judgment and dismissed plaintiff's petition saying as follows:

“Certainly no holder of a patent should be put to the expense of defending a suit by another person or sundry persons under the Declaratory Judgment Act, 28 U. S. C. §400, unless that person or persons is or may be damaged by affirmative acts of the

patent holder. A holder of a patent has a right to investigate or inquire with relation to other devices of a nature similar to those he will or is manufacturing, and such investigation or inquiry does not seem to be improper nor does it contain a threat of infringement. The answering affidavit of Mr. Scowe states that he cannot recall what was said, but he had an 'understanding' and from the conversation he 'understood.' Nothing in Mr. Scowe's affidavit is of testimonial value. *It is apparent that an effort is being made to call the defendant into court without proper proof of a statement amounting to a charge of infringement* (italics ours).

"In the case of *Treemand Co. v. Schering Corp.*, 3rd Cir., 122 F. 2d 702, *supra*, Judge Clark, quoting from Borchard Declaratory Judgments, 2d Ed., 1941, 807, said: 'And yet, it seems best to limit declaratory relief for the infringer to cases in which an adversary claim has been made against him, though it may, it is believed, apply to an article not yet manufactured but only about to be manufactured. This requirement, present in practically all the adjudicated cases, refute the fear that patentees might be harassed by prospective infringers and would be obliged continually to defend their patents. The fact that a patentee's claim of infringement is a condition precedent to this type of action places the matter of adjudication of the patent within the control of the patentee, for, if he wishes to avoid adjudication he can refrain from making charges of patent infringement.' "

It is likewise quite settled that for the infringer to maintain an action for declaratory relief the threat of infringement must be quite definite and certain and not merely nebulous. An anticipation as to a future course of events is, of course, not a justiciable controversy (*San*

Francisco Lodge v. Forestal, 58 Fed. Supp. 466) and in *F. W. Maurer v. Andrews*, 30 Fed. Supp. 637, 638, it was held that an actual controversy under the Declaratory Judgments Act cannot be created by taking a position and then challenging the opposing side to dispute it.

There must be more than a mere *possibility* of a dispute. The infringer must be charged to infringe or helping others to infringe. (*Tuthill v. Wilsey*, 85 Fed. Supp. 586, 589.) In this case the plaintiff in an action for declaratory relief to declare a patent void contended that in a suit brought in the State Court the defendant alleged that pumps made by the plaintiff were covered by the defendant's patent. The court held that this was an insufficient charge of infringement and created no justiciable issue.

In *Pomerontz v. Jean Vivedou*, 65 Fed. Supp. 948, the defendants wrote a letter regarding the infringement of its patents. Plaintiff thereupon brought an action for declaratory relief. Held the letter did not show a controversy over this *particular* patent and the Court thereupon dismissed the cause, further stating that the purpose of the suit was to "fish" for other patents infringed by the plaintiff.

In *New Discoveries v. Wisconsin Alumni*, 13 Fed. Supp. 596, a complaint was dismissed for failing to allege that the plaintiff was using defendant's products or infringing the defendant's products, the court further holding that a notice of infringement does not give rise to an actual controversy. In this connection it should be further stated that this case, although not overruled, did not meet the formal approval of the court in the case of *Treemond v. Schering*, heretofore quoted.

And Judge Yankwich in *Bettis v. Patterson-Ballagh Corp.*, 16 Fed. Supp. 455, in holding that you cannot litigate an apprehended claim but only an actual one, said on pages 461-462 that:

“A person merely apprehending or fearing the assertion of rights against him by another cannot bring him into court and compel him to litigate.”

Only when the patent owner makes his position clear with respect to a manufacturer's customers and the manufacturer finds his position affected by such assertion may the manufacturer then bring an action for declaratory relief. (*Arlac v. Hat Corporation of America*, 166 F. 2d 286, 293; *Girdlar v. E. I. Du Pont*, 56 Fed. Supp. 871, 875; *Zenith v. R. C. A.*, 78 Fed. Supp. 591, 594.)

This principle was clearly enunciated in *Taylor v. Brotherhood of Ry. etc.*, 106 Fed. Supp. 438, where the court said on page 442:

“A party seeking declaratory relief must be confronted by a presently existing danger to establish legal rights, not a contingent, potential or possible liability (citing cases). It is settled in this jurisdiction and elsewhere that claims based merely upon assumed potential invasions of rights are not enough to warrant judicial determination by way of declaratory judgment or otherwise (citing cases).”

Paragraph V of the cross-complaint alleges [Tr. of Rec. p. 46]:

“At a time within the last six years, third party defendant stated to a customer of this third party plaintiff that excavating teeth made by this third party plaintiff comprised an infringement of said Letters Patent.”

It is respectfully submitted that under the authorities this vague and hazy allegation is insufficient to create a justiciable issue.

To make the cross-complaint sufficient to present a controversy under the patent laws, it must allege an actual charge of infringement. (28 U. S. C. A., Sec. 2201; *Tremond v. Schering Corp.*, 122 F. 2d 702, 705; *Tuthill v. Wilsey*, 182 F. 2d 1006, 1008.)

POINT III.

The Judgment Entered in Favor of Cross-Complainant Is Void.

Rule 37d, F. R. C. P., permits the Court, on proper notice, to strike out a pleading and enter a judgment by default against the party, should he fail to serve answers to interrogatories submitted under Rule 33. Entry of a default judgment is accomplished pursuant to Rule 55, F. R. C. P. Under subdivision b(1) of that rule, the Clerk of the Court may enter such judgment if it is for a sum certain or for a sum that can by computation be made certain. In all other cases the party entitled to a judgment by default must apply to the Court after serving written notice of the application at least three days prior to the hearing thereof and the Court may conduct such hearings and order such references as may be necessary to establish the truth of any averment by evidence. (Rule 55b, (2) F. R. C. P.) In the case at bar the judgment was void for failing to establish any evidence as to the truth of any of the averments in the cross-complaint.

Bearing in mind that the cross-complaint is for the purpose of declaring a patent invalid [Tr. of Rec. pp. 45-51] and to determine the title to a registered trade

mark [Tr. of Rec. pp. 51-65], there should be some evidence to establish the cross-complainant's claim.

It is Hornbook law that a patent is entitled to the presumption of validity. (*Payne Furnace v. Williams Wallace* (9th Cir.), 117 F. 2d 823, 826; *Associated Plastics v. Gits Molding*, 182 F. 2d 1000, 1006.) Where the patent is regularly issued, it and all claims are presumptively valid and the burden of establishing invalidity is on those opposing it (*Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.* (9th Cir.), 151 F. 2d 91, 94), and such presumption is overcome only by clear and convincing evidence. The proof must be more than a dubious preponderance; it must be strong, clear and convincing. (*Oliver United Filters v. Silver*, 206 F. 2d 658, 664.)

In *Patterson-Ballough Corp. v. Moss* (9th Cir.), 201 F. 2d 403, this Court on page 406 said as follows:

“Appellants have the burden of proof on the question of the validity of the Moss patent since a presumption of validity arises from the issuance of the patent (citing cases). Reasonable doubts must be resolved in favor of the validity of the patent. The presumption created by the action of the patent office is the result of the expertness of an administrative body acting within its specific field and can be overcome only by clear, convincing proof.”

In *Cummings v. Moore*, 202 F. 2d 145, the court on page 148 said:

“The grant of letters patent raised a *prima facie* presumption that defendant was the inventor of the brush and the burden rested upon plaintiff to show otherwise by evidence which was clear, strong and convincing.”

The same rule applies to the registration of trade marks, this court holding in *Rolley Inc. v. Younghusband*, 204 F. 2d 209, 211, that the registration of a trade mark creates a rebuttable presumption of validity which must be overcome by the person challenging it.

In *Barbasol Co. v. Jacobs*, 160 F. 2d 336, the court on page 338 said:

“On the question of the validity of the trade mark, we start with the recognized rule that the registration of a trade mark raised a strong presumption of its validity (citing cases).”

The mere fact that the cross-defendant is present in court without the benefit of an answer to the cross-complaint does not entitle the cross-complainant to its relief without adducing proper evidence to support its position. (Rule 55b(2), F. R. C. P.) The cross-defendant, Laurence Massa, is still entitled to those presumptions given to him by law; and it was therefore incumbent for the cross-complainant to sustain its allegations in the cross-complaint by clear and convincing proof. Its failure to do so renders the judgment [Tr. of Rec. pp. 99-100] entered in behalf of the cross-complainant null and void.

POINT IV.

The Judgment Rendered in Favor of the Cross-Complainant Should Be Reversed.

Respectfully submitted,

JOSEPH W. FAIRFIELD, and
ETHELYN F. BLACK,

Attorneys for Appellant.